IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1651.

NEW JERSEY DENTAL ASSOCIATION, a Not-For-Profit Corporation of the State of New Jersey, MERCER DENTAL SOCIETY, a Not-For-Profit Corporation of the State of New Jersey, SOUTHERN DENTAL SOCIETY OF THE STATE OF NEW JERSEY, a Not-For-Profit Corporation of the State of New Jersey, NEW JERSEY DENTAL SERVICE PLAN, INC., a Not-For-Profit Corporation of the State of New Jersey, DR. PAUL G. ZACKON, an Individual, DR. DONALD DeFONCE, an Individual, DR. EUGENE BASS, an Individual, DR. LEWIS KAY, an Individual, DR. STANTON DEITCH, an Individual, DR. ROBERT FISCHER, an Individual and DR. JOSEPH POLLACK, an Individual,

Petitioners,

v.

STANLEY S. BROTMAN, United States District Judge for the District of New Jersey,

Respondent.

BRIEF OF RESPONDENTS HEALTH CORPORATION OF AMERICA, ET AL. IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TABLE OF CITATIONS.

QUESTIONS FOR REVIEW.

1. Will a Writ of Mandamus issue to compel a district judge to reverse his legal Opinion and interlocutory Order denying Petitioners' motion to dismiss a private antitrust action?

2. Will a Writ of Mandamus issue to compel a district judge to reverse his opinion that an immediate appeal of an interlocutory order did not ". . . involve[s] a controlling question of law as to which there is substantial ground for difference of opinion . . ." and that such an appeal would not "materially advance the ultimate termination of the litigation"?

STATUTES INVOLVED.

28 U. S. C. Section 1292(b).

Interlocutory Decisions.

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(b) When a district judge, in making in a civil action an order not otherwise appealable under this section shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. (June 25, 1948, ch. 646, 62

Stat. 929; Oct. 31, 1951, ch. 655, Section 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-505, Section 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.)

United States Code, 1970 ed., Volume 5, page 7563

28 U. S. C. Section 1651.
Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. (June 25, 1948, ch. 66, 62 Stat. 944; May 24, 1949, ch. 139, Section 90, 63 Stat. 102.)

United States Code, 1970 ed., Volume 5, page 7601

STATEMENT OF THE CASE.

Plaintiffs below, who are Respondents herein along with the Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, filed this private antitrust action against Petitioners in November, 1975. Instituted pursuant to Sections 4 and 16 of the Clayton Act, 15 U. S. C. Sections 15 and 26, the action alleges violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. Sections 1 and 2. On December 18, 1975, Petitioners filed their Answer and Counterclaim. On October 8, 1976, within a few days of the commencement of a mutually agreed upon discovery schedule, Petitioners gave notice that they intended to file what was denominated a Motion to Dismiss the Complaint. The District Court recognized that Petitioners' motion was properly in the nature of a summary judgment procedure and treated it as such (A48). After review of the briefs submitted by the parties as well as consideration of the oral argument, the District Court denied Petitioners' Motion (A46 et seq.). Subsequently, after an oral hearing, the District Court denied Petitioners' request that the Court reconsider its decision and further determined that, as the criteria as set forth by 28 U. S. C. Section 1292(b) were not met, an interlocutory appeal would be inappropriate (A57). Thereafter, on February 22, 1977, Petitioners filed a petition for a Writ of Mandamus with the United States Court of Appeals for the Third Circuit, which was denied on February 24, 1977 (A59).

ARGUMENT.

I. Petitioners Are Not Requesting a Petition for Writ of Certiorari.

Despite titling their Petition in the alternative, it is clear that Petitioners are only requesting that the Court grant permission to file a Petition for a Writ of Mandamus and do not seriously assert that a Writ of Certiorari should issue. This is plainly evident when one examines Petitioners' "Questions for Review" found on page six of their brief. According to Petitioners, what is to be determined by this Court is whether a District Court can be subject to a Writ of Mandamus for denying a motion to dismiss, by Petitioners, in a private antitrust action and whether the District Court can be required, by Writ of Mandamus, to certify that denial of the motion to dismiss for interlocutory appeal pursuant to 28 U. S. C. Section 1292(b). No mention is even made of whether a Writ of Certiorari could properly issue.

Further support for the contention that Petitioners are not requesting that a Writ of Certiorari issue comes upon review of Petitioners' statement of which statutes are involved in this proceeding, starting on page six of their brief. Simply put, 28 U. S. C. Section 1254(a), the statute pursuant to which a Writ of Certiorari is granted, is not listed by Petitioners as one which is involved herein.

Finally, Rule 19 of the Rules of the Supreme Court sets forth the considerations governing review on Writ of Certiorari and states that it "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor". However, Petitioners have not made one argument or

vouchsafed one reason why or for what "special and important reason" this Court should exercise its discretion and issue a Writ of Certiorari. Instead, their entire brief is devoted to explaining why a Writ of Mandamus is appropriate.

Clearly then, Petitioners have not requested that a Writ of Certiorari issue to the United States Court of Appeals for the Third Circuit.

II. A Writ of Mandamus Is Wholly Inappropriate.

A. A Writ of Mandamus Is Not to Be Used in Place of an Appeal.

The primary thrust of Petitioners' argument is that the District Court was incorrect in refusing to grant their motion to dismiss the Complaint. While Respondents, plaintiffs below, strongly contend that the District Court was correct in so doing, the question of the legal accuracy of that decision is completely irrelevant. Petitioners would have this Court issue a Writ of Mandamus to a District Court as a result of the lower court's determination of a legal issue in an interlocutory order. However, as was stated in *Gulf Research and Development v. Harrison*, 185 F. 2d 457, 459 (9th Cir. 1950):

> ". . . it has been repeatedly held that: 'Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. . . . [T]hey have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. . . . As extraordinary remedies, they are reserved for really extraordinary causes.' Ex parte Fahey, 1947, 332 U. S. 258, 259-

60, 67 S. Ct. 1558, 1559, 91 L. Ed. 2041. In this case, no extraordinary circumstances have been called to our attention. Petitioner alleges nothing more than an erroneous application of the law. The error, if any, will be reversible on appeal to the Court of Appeals for the Third Circuit, after final judgment has been entered. Mandamus cannot be subverted to perform the function of an interlocutory appeal, over which we have no jurisdiction. The inconvenience of proceeding to what may be an unnecessary trial has long been recognized as one of the hardships of litigation in our judicial system, but such hardship does not measure up to the inconveniences which would result if piecemeal appeals were permitted. Accordingly, this inconvenience has consistently been held insufficient to justify mandamus."

Well over one hundred years ago, this Court forcefully stated that what Petitioners have asked is totally impermissible:

> "Superior tribunals may by mandamus command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed . . . .
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> "Power is given to this court by the Judiciary Act, under a writ of error or appeal, to affirm or reverse the judgment of the Circuit Court, and in certain cases to render such judgment or decree as the Circuit Court should have rendered or passed, but no such power is given under a writ of mandamus, nor is it competent for the superior tribunal, under such a writ, to re-examine the judgment or decree of the subordinate court. Such a writ cannot perform the functions of an appeal or writ of error as the superior court will not, in any case, direct the judge of the subordinate court what judgment or decree to enter in the case, as the writ does not vest in the superior court any power to give any such direction or to interfere in any manner with the judicial discretion and judgment of the subordinate court." *Ex. Parte Newman*, 81 U. S. 152, 169-70 (1871).

See also *Roche v. Evaporated Milk Association*, 319 U. S. 21, 63 S. Ct. 938 (1943); *Norte & Co. v. Defeance Industries, Inc.*, 319 F. 2d 336 (2d Cir. 1963); *DeBeers Consol. Mines v. U. S.*, 325 U. S. 212, 65 S. Ct. 1130 (1945); *A. C. Nielson Co. v. Hoffman*, 270 F. 2d 693 (7th Cir. 1959); and *Schlagenhauf v. Holder*, 379 U. S. 104, 112, 85 S. Ct. 234, 239 (1964), where it was said:

> ". . . The writ of mandamus is not to be used 'when the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction'. Parr v. United States, 351 U. S. 513, 520, 76 S. Ct. 912, 917, 100 L. Ed. 1377; see Bankers Life & Casualty Co. v. Holland, supra, 346 U. S. at 382, 74 S. Ct. at 147."

It is clear that in making its decision on the motion to dismiss, the District Court was performing a function within its jurisdiction. The most that can be contended by Petitioners is that the decision was erroneous. Under these circumstances to request that a Writ of Mandamus issue to force the District Court to change that decision is clearly inappropriate.

B. A Writ of Mandamus Will Not Issue to Compel a District Court to Make a Certification Pursuant to 28 U. S. C. Section 1292(b).

Prior to 1958, the principle, operative since the beginning of the Republic, stood fast that, except for a very few statutorily described orders, interlocutory appeals were forbidden. However, recognizing that in some instances, interlocutory appeals would be beneficial, Congress enacted 28 U. S. C. Section 1292(b). Nonetheless, great care was taken to ensure that the litigation process was not overly disrupted, and the judicial system overwhelmed, by a flood of interlocutory appeals. Therefore, both the District Court and the Court of Appeals were required to examine each petition for interlocutory appeal and, through exercise of their discretion, certify that the situation was one which mandated avoidance of the final judgment rule. Given this background, to suggest, as do Petitioners, that the District Court's determination that this is not a case for interlocutory review should be ignored, is somewhat startling.

Notwithstanding Petitioners' assertion that the Second Circuit has endorsed the suggestion that a writ of mandamus can issue to compel certification pursuant to 28 U. S. C. Section 1292(b), by a district court, not one court has ever taken such a drastic step. In fact, the Second Circuit, along with every other Court of Appeals which has had to decide the issue has strongly indicated that it would never be done.

> "Finally, we cannot conceive that we would ever mandamus a district judge to certify an appeal under 28 U. S. C. Section 1292(b), in plain violation of the Congressional purpose that such appeals should be heard only when both the courts concerned so desire." *D'Ippolito v. Cities Service Co.*, 374 F. 2d 643, 649 (2d Cir. 1967).

Japan Line Ltd. v. Sabre Shipping Corp., 407 F. 2d 173 (2d Cir. 1969) which Petitioners cite as authority for their contention that the Second Circuit concurs with their position actually does not involve the question *sub judice* at all. In reality, the Court was deciding whether the denial of a 28 U. S. C. Section 1292(b) certification barred a writ of mandamus with regard to the underlying order. The Court did not consider the propriety of mandamus to review the denial of the interlocutory appeal. The Second Circuit decided that in an appropriate case they could issue such a writ of mandamus but in no way disavowed the statement made in *D'Ippolito v. Cities Service Co., supra.* In fact, *D'Ippolito* was cited by the Court in *Japan Line Ltd. v. Sabre Shipping Corp., supra* as authority for the statement quoted by Petitioners in their brief. In 1972, the Second Circuit had occasion to address this question again and stated:

> "Judge Ryan did not explicitly rule on defendants' motions to dismiss on the ground of *forum non conveniens*, nor include this issue among the questions certified pursuant to 28 U. S. C. Section 1292(b). Defendants' request that we mandamus him to certify the issue meets an insurmountable obstacle. Congress plainly intended that an appeal under Section 1292(b) should lie only when the district court and the court of appeals agreed on its propriety. It would wholly frustrate this scheme if the court of appeals could coerce decision by the district judge. *D'Ippolito v. Cities Service Co.*, 374 F. 2d 643, 649 (2 Cir. 1967); see 9 Moore, Federal Practice, Section 110-22[3]" *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F. 2d 1326, 1344 (2d Cir. 1972).

Should this Court do as the Court of Appeals for the Third Circuit did and refuse Petitioners' attempts to have a Writ of Mandamus issue, Petitioners will suffer no harm or injury of any consequence. They will merely have to engage in the normal litigation process as contemplated by Congress and the Courts. At the time of final judgment in this action Petitioners can, if they so wish, appeal in the normal manner the District Court's refusal to grant their motion. In this situation, the courts have unanimously held the issuance of a writ of mandamus to be inappropriate.

> ". . . Nor is there a right in a situation of such circumstances to seek mandamus even where an attempt has been made and denied to proceed under Section 1292(b). Interlocutory orders whose consequences are able to be corrected by an appeal from a final judgment may not at all be made the subject of relief in mandamus except in extraordinary circumstances. (citations omitted).
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> This means that, as to an interlocutory order, which the court has a judicial right to make, mandamus can be sought only to enable justice to be materially furthered in the procedural needs of some extraordinary situation. It cannot be sought merely to shortcut incidents of time, expense, inconvenience, new trial, etc. which are inherent in the orderly course of litigation generally." *Evans Electrical Const. Co. v. McManus*, 338 F. 2d 952, 953 (8th Cir. 1964).

See also *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 74 S. Ct. 145 (1953); *Williams v. Maxwell*, 396 F. 2d 143 (4th Cir. 1968); *Federal Savings and Loan Ins. Corp. v. Reeves*, 148 F. 2d 731 (8th Cir. 1945); *Regec v. Thornton*, 275 F. 2d 801 (6th Cir. 1960); *Norte & Co. v. Defeance Industries Inc.*, 319 F. 2d 336 (2d Cir. 1963).

Therefore, it is clear that mandamus is not appropriate to force a district court to certify an interlocutory order for appeal pursuant to 28 U. S. C. Section 1292(b).

III. Conclusion.

What Petitioners have asked this Court to do is allow them to circumvent the final judgment rule as well as the intent of Congress as embodied in 28 U. S. C. Section 1292(b). Respondents, plaintiffs below, firmly believe that the Writ of Mandamus does not exist for that purpose. Its use to compel the District Court to certify pursuant to 28 U. S. C. Section 1292(b) or to reverse a ruling of law would only open the floodgates to piecemeal appeals and completely disrupt the judicial system as it presently exists.

For that reason, Respondents, Health Corporation of America, et al. respectfully request that Petitioners' motion to be allowed to file a Petition for Writ of Mandamus be denied.

Respectfully submitted,

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